HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

Writ Appeal No.575 of 2007

Between:

Ch. Enoch

... Appellant

And

Union of India, through Secretary,
The Government of India, Ministry
of Railways, New Delhi and others

... Respondents

Counsel for the appellant: Party-in-person

Counsel for the respondents: Shri Gouri Shankar Sanghi

::JUDGMENT::

July 13, 2007

Per G.S. Singhvi, CJ

This is an appeal for setting aside order dated 31.1.2007 passed by the learned Single Judge whereby he rejected the appellant's prayer for issue of a mandamus to the respondents to promote him as Inspector, Railway Protection Force with

retrospective effect.

The appellant joined the service as Sub-Inspector in Railway Protection Force, South Central Railway, with effect from 25.2.1963. In the course of service, five departmental enquiries were instituted against him and he was punished. He successfully challenged the orders of punishment in Writ Petition Nos.4241 of 1972, 1639 of 1973, 3725 of 1975, 5240 of 1978, 11447 of 1983 and 12341 of 1983. His case was considered by the Departmental Promotion Committee (DPC) in 1973, 1976, 1979, 1981, 1983 and 1984 for promotion to the post of Inspector, but he was not found suitable on account of adverse entries in the confidential reports. He was promoted as Inspector Grade-II with effect from 14.11.1987 and as Inspector Grade-I with effect from 1.1.1996. After 3 years and six months of his promotion as Inspector Grade-II, the appellant filed Writ Petition (Civil) No.596 of 1991 before the Supreme Court, which was disposed of on 18.7.1991 in the following terms:

> "We are of the view, on hearing counsel, that this is a case which could be canvassed before the High Court in a petition under Article 226 of the Constitution and a petition under Article 32 of the Constitution should not be entertained. We direct the writ petition to be transferred to Andhra Pradesh High Court where the petition may be dealt with as one under Article 226 of the Constitution.
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> Petitioner's grievance seem to have originated about 15 to 18 years back and in that view of the matter the High Court will consider this case out of turn and expeditiously, preferably within a year."

The appellant did not pursue his cause in terms of the direction given by the Supreme Court. Instead, after a gap of 4 years and 3 months, he filed Writ Petition No.22596 of 1995 with the following prayer:

> "I therefore pray that this Hon'ble Court may be pleased to issue a writ, order or direction more particularly one in the nature of the Writ of Mandamus or any other appropriate writ, declaring the

action of the respondent in not promoting me to the post of Assistant Security Commissioenr (ASC) in the R.P.F. as illegal declaring the action of the respondent in promoting my juniors to the post of ASC in the R.P.F. ignoring my seniority and in spite of the fact that I am senior to them as illegal and violative of Articles 14 and 16 of the Constitution of India and I further pray that this Hon'ble Court to direct the respondents to promote me to the post of ASC in the R.P.F. with retrospective effect i.e. from the date on which my juniors were promoted to the posts of Inspectors and grant me all consequential benefits with retrospective effect from the date on which I am deemed to have been promoted to the post of ASC, and further pray that this Hon'ble Court to call for all relevant records for scrutiny by this Hon'ble Court in doing me justice and to pass such other or further order as this Hon'ble Court may deemed fit and proper in the circumstances of the case."

In the affidavit filed by him, the appellant relied on Rule 24 of the Railway Protection Force Rules, 1959, Chapter XII of the Railway Protection Force Regulations, 1966 and claimed that he was entitled to be promoted as Inspector Grade-II in the year 1973 and on the higher posts of Inspector Grade-I and Assistant Security Commissioner in the subsequent years, but the respondents arbitrarily ignored his case and promoted large number of his juniors in the cadre of Sub-Inspector.

In the counter filed on behalf of the respondents, Shri M. Ratan, Chief Security Commissioner made elaborate reference to the disciplinary proceedings instituted against the appellant and circular dated 1.6.1971 issued by the Railway Board and averred that the Departmental Promotion Committee comprising three Chief Security Officers considered the appellant's case for promotion in the years 1973, 1976, 1979, 1981, 1983 and 1985, but he was not recommended for the rank of Inspector Grade-II because of poor service record. Shri M. Ratan also raised the objections of delay and non-joinder of juniors of the appellant as parties to the writ petition.

The learned Single Judge noted that the posts of Inspector

Grade-II and Grade-I are selection posts and held that promotion to these posts cannot be claimed as of right. The learned Single Judge then referred to the adverse remarks recorded in the Annual Confidential Reports (ACRs) of the appellant from 1968 to 1985 and held that the High Court cannot sit in appeal over the recommendations made by the Departmental Promotion Committee. The learned Single Judge also noted that the writ petition was filed after long lapse of time and rejected the appellant's claim by recording the following observations:

> "It is not disputed that the petitioner's next promotion is Inspector Grade-II which is a selection post and when he was successful in the written examination and in viva voce, after considering his confidential reports, the Departmental Promotion Committee had not selected him in view of the fact that adverse remarks were recorded in the annual confidential reports. It is not in dispute that he was promoted as Inspector Grade only on 14-11-1987 and further promoted as Inspector Grade-I on 01-01-1996. The petitioner's only grievance is that he is entitled to be promoted with a date anterior to the date on which he was promoted. He ought to have questioned the same on being promoted without anterior date. The very fact is that the petitioner is claiming promotion from 1984 by filing the writ petition in the year 1995. The petitioner has not explained the delay why he has not chosen to challenge the same when he was promoted on 14-11-1987. Merely because the petitioner was successful in the writ ten examination and was called for viva voce, his promotion to the next higher post is not automatic and the DCP is under the obligation to verify performance in the substantive post and confidential records as to leadership, man management qualities etc., for effecting promotion. When the past records of the petitioner in respect of his performance continuously disclose poor or bad, he cannot claim promotion on par with his juniors.
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> Having kept quite for eleven years after denying promotion under the Up-gradation Scheme held in the year 1984 and having accepted the promotion of Inspector Grade-II on 14-11-1987, he waived his right, if any, and it is not open for him to contend that he is entitled for promotion from 1984. The writ petition fails and it is accordingly dismissed. No costs."

The appellant, who appeared in person, argued that the finding recorded by the learned Single Judge on the issue of delay should be ignored because it is based on misreading of the record of the writ petition. He referred to order dated 18.7.1991 passed by the Supreme Court in Writ Petition (Civil) No.596 of 1991 and argued that the learned Single Judge committed a serious error by non-suiting him on the ground of unexplained delay of eleven years. The appellant emphasized that he has been relentlessly pursuing his cause before departmental authorities and the Court and argued that the learned Single Judge should not have non-suited him only on the ground of delay in filing the writ petition. He further argued that the adverse remarks recorded in the Annual Confidential Reports are end product of bias and

mala fides of the concerned Chief Security Officers and, therefore, his non-selection for promotion to the posts of Inspector Grade-II, Inspector Grade-I and Assistant Security Commissioner should be declared illegal and violative of the doctrine of equality enshrined in Articles 14 and 16 of the Constitution and the respondents be directed to promote him with retrospective effect on the posts of Inspector Grade-II, Inspector Grade-I and Assistant Security Commissioner.

We have given serious thought to the arguments/ submissions of the appellant, but have not felt impressed. The pleadings of the parties show that the appellant's case was repeatedly considered by six different Departmental Promotion Committees, but he was not selected due to adverse service record. The orders passed by this Court in different writ petitions filed by the appellant could legitimately entitle the appellant to seek review of his case, but the fact of the matter is that he did not seek intervention of the Court till the filing of writ petition before the Supreme Court in 1991 i.e. after more than 3

years and 6 months of his promotion as Inspector Grade-II. Their Lordships of the Supreme Court directed transfer of the writ petition to the High Court with a further direction to this Court to accord out of turn hearing, but the appellant did not pursue the matter. It is neither the pleaded case of the appellant nor he argued before us that he made efforts to find out the status of the transferred case or applied for hearing, but could not succeed. Rather, it is an admitted position that instead of pursuing his cause in terms of the direction given by the Supreme Court, the appellant filed fresh writ petition sometime in the month of October, 1995. If the issue of delay is examined in the context of the appellant's claim for promotion vis-à-vis those who were recommended by the Departmental Promotion Committees, then there is no escape from the conclusion that the appellant had approached this Court after a time gap of 11 to 22 years. This long delay has to be treated fatal to the appellant's claim for promotion with retrospective effect and we do not see any reason to interfere with the discretion exercised by the learned Single Judge not to entertain the appellant's prayer for issue of a direction to the respondents to promote him with retrospective effect.

It is true that no limitation has been prescribed for filing writ petition under Article 226 of the Constitution, but the Constitutional Courts have always been skeptical and slow in entertaining petition filed after long lapse of time. In **State of M.P. v. Bhailal Bhai**[1], the Constitution Bench of the Supreme Court considered the issue of delay in the context of the claim made by the respondents for refund of the illegally collected tax and laid down the following propositions:

> 1) The special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil Court or to deny defence legitimately open in such actions. The power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of

mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it.

2) It is not easy nor is it desirable to lay down any rule for universal application. It may, however, be stated as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases if will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil Court and to refuse to exercise in his favour the extra-ordinary remedy under Art. 226 of the Constitution.

3) The provisions of the Limitation Act do not as such apply to the granting of relief under Art. 226. However, the maximum period fixed by the Legislature as the time within which the relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable.

A similar view was expressed, though in different words, by majority of another Constitution Bench in **Tilokchand Motichand v. H.B. Munshi**[2]. The propositions laid down in the majority judgment of the Supreme Court are extracted below:

> "Utmost expedition is the sine qua non for such claims. The party aggrieved must explain satisfactorily all semblance of delay. No period can be indicated which may be regarded as the ultimate limit of action for that would taking upon itself legislative functions. In England a period of 6 months has been provided statutorily, but that could be because there is no guaranteed remedy and the matter is one entirely of discretion. In India each case will have to

be considered on its own facts. Avoidable delay affecting the merits of the claim, will disentitle a party to invoke the extraordinary jurisdiction.

The question is one of discretion for this Court to follow from case to case. This Court need not necessarily give the total time to the litigant to move this Court under Article 32, even though he may be within statutory limitation. Similarly in a suitable case this Court may entertain a petition even after limitation. It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose."

The majority opinion expressed in **Tilokchand Motichand v. H.B. Munshi** (supra) was approved by a larger Bench in **Mafatlal Industries Ltd. v. Union of India**[3].

In service matters, the Courts have applied the rule of delay with greater rigor - **Rabindra Nath v. Union of India**[4], **P.S. Sadasivaswamy v. State of T.N.**[5], **Roshan Lal v. International Airport Authority of India**[6], **Gian Singh Mann v. High Court of P & H**[7], **Union of India v. S.S. Kothiyal**[8], **Prafulla Kumar Pallai v. State of Orissa**[9], **A.J. Fernandis v. Divisional Manager, S.C. Rly.**[10], **K.A. Abdul Majeed v. State of Kerala**[11], **U.P. Jal Nigam v. Jaswant Singh**[12], **Uttaranchal Forest Development Corpn. v. Jabar Singh**[13] and **A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala**[14].

In **U.P. Jal Nigam v. Jaswant Singh** (supra), the Supreme Court considered the question whether the High Court was justified in granting relief to the employees on the basis of judgment in **Harwindra Kumar v. Chief Engineer, Karmik**[15], even though they had accepted the retirement and taken the monetary benefits and

approached the Court after long lapse of time. While allowing the appeals, the Supreme Court referred to the earlier judgments in **State of Karnataka v. S.M. Kotrayya**[16], **Jagdish Lal v. State of Haryana**[17], **Union of India v. C.K. Dharagupta**[18], **Govt. of W.B. v. Tarun K. Roy**[19] and culled out the following statement of law contained in Halsbury's Laws of England:

> "In determining whether there has been such delay as to amount to laches, the chief points to be considered are:
> (*i*) acquiescence on the claimant's part; and
> (*ii*) any change of position that has occurred on the defendant's part.
>
> Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

Their Lordships of the Supreme Court also invoked the principle of acquiescence and observed:

> "In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents

> have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"

By applying the legal principles enunciated in the above noted judgments to the facts of this case, we hold that the writ petition filed by the appellant was highly belated and the learned Single Judge did not commit any error by non-suiting him on the ground of laches.

We also agree with the learned Single Judge that the appellant who earned adverse remarks in the Annual Confidential Reports in successive years from 1968 onwards cannot complain of violation of the doctrine of equality and seek a direction for his promotion. The entries recorded in the confidential reports of the appellant show that he was adversely commented with reference to almost all indicia's of his personality, conduct, discipline, work, knowledge etc. Therefore, the Departmental Promotion Committee cannot be accused of having acted arbitrarily by not recommending the appellant's case for promotion from 1973 to 1984. In exercise of the power vested in it under Article 226 of the Constitution of India, the High Court cannot sit in appeal over the recommendations made by the Departmental Promotion Committee. In such matters, the power of judicial review can be exercised only for determining whether the process of selection is vitiated due to violation of any statutory provision or mala fides.

The appellant has neither pleaded nor argued that the procedure adopted by the Departmental Promotion Committees is contrary to the statutory rules. He did make an allegation of mala fides against some of the Chief Security Officers, but this plea cannot be entertained because none of the Chief Security Officers, who

recorded adverse entries in Annual Confidential Reports, was impleaded as a party and without hearing that person, the issue of malice in fact cannot be adjudicated.

There is another reason for declining relief to the appellant. As per the appellant's own showing, persons junior to him in the cadre of Sub-Inspectors were promoted on the recommendations of the Departmental Promotion Committees held in 1973, 1976, 1979, 1981, 1983 and 1984. Some of the juniors were further promoted as Assistant Security Commissioner and thereby acquired valuable rights to hold higher posts and positions. Therefore, without hearing them, this Court cannot issue a direction for annulment of the recommendations made by the Departmental Promotion Committees. Likewise, a direction for retrospective promotion of the appellant cannot be given because the same would adversely affect the persons who were already promoted to the higher posts of Inspector Grade-II, Inspector Grade-I and Assistant Security Commissioner. In our considered view, non-impleadment of the erstwhile juniors, who were promoted on the recommendations of different Departmental Promotion Committees, is fatal to the very maintainability of the writ petition.

No other point has been argued.

In the result, the appeal is dismissed.

G.S. SINGHVI, CJ

July 13, 2007

C.V. NAGARJUNA REDDY, J

svs

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[1] AIR 1964 SC 1006

[2] (1969) 1 SCC 110

[3] (1997) 5 SCC 536

[4] AIR 1970 SC 470

[5] (1975) 1 SCC 152

[6] AIR 1981 SC 597

[7] (1980) 4 SCC 266

[8] (1998) 8 SCC 682

[9] 1999 SCC (L & S) 777

[10] (2001) 1 SCC 240

[11] (2001) 6 SCC 292

[12] (2006) 11 SCC 464

[13] (2007) 2 SCC 112

[14] (2007) 2 SCC 725

[15] (2005) 13 SCC 300

[16] (1996) 6 SCC 267

[17] (1997) 6 SCC 538

[18] (1997) 3 SCC 395

[19] (2004) 1 SCC 347